Supreme Court, U.S.
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No. 96-7185

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GARRIT BATES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Must the United States of America prove fraudulent intent on the part of the defendant, Garrit Bates, as an essential element of the crime of knowingly and willfully misapplying federally insured funds, proscribed by 20 U.S.C. § 1097(a)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
SUMMARY OF REPLY ARGUMENT	1
REPLY ARGUMENT	1
A. The position of the Government is inconsistent in its analysis of the essential elements of "knowing and willful misapplication"	1
B. The Government's position is inconsistent by acknowledging that misapplication is a species of conversion while admitting that the conduct with which Mr. Bates is charged is a failure to make refunds	3
C. The Government is inconsistent and inaccurate in its description of the factual allegations of the indictment	4
CONCLUSION	5

TABLE OF AUTHORITIES

Cases Page

UNITED STATES SUPREME COURT

Ratzlaf v. United States, 510 U.S. 135 (1994)..... 4

SUMMARY OF REPLY ARGUMENT

Mr. Bates responds to the argument posited by the Government in its brief on the merits by demonstrating that the Government's position is internally inconsistent in at least Three (3) significant aspects: (1) by admitting that to establish a knowing and willful misapplication under § 1097(a) an awareness of the unauthorized nature of the use of funds *and* intentional conduct must be shown, yet continuing to deny that fraudulent intent is an essential element of the offense; (2) by acknowledging that misapplication is a species of conversion focusing on unauthorized *use* of funds, yet admitting that Mr. Bates is actually charged with an error of omission—e.g. a failure to make refunds; and, (3) by overstating allegations of the indictment to foster an appearance that Mr. Bates was alleged to to have actively misused funds. These inconsistencies illustrate the weakness in the government's position and demand a conclusion that fraudulent intent, in addition to conversion, is an essential element of the offense of misapplication of funds as proscribed by 20 U.S.C. § 1097(a). As the indictment failed to identify either essential element by concept or factual allegation, the indictment must be dismissed.

REPLY ARGUMENT

A. The position of the Government is inconsistent in its analysis of the essential elements of "knowing and willful misapplication".

In its brief, the Government states that the "*mens rea* requirement of misapplication under Section 1097(a) is satisfied by knowing and intentional conduct—here, involving consciousness that the use of property is unauthorized." [Gov. Br. p. 23]. The Government also states that the *mens rea* element "knowingly and willfully" . . . "requires only that the defendant be aware that his use of the funds is unauthorized or wrongful and that he act intentionally." [Gov. Br. p. 15]. Thus, it seems quite

clear that the Government is stating that the essential elements of the crime of misapplication of funds as proscribed by § 1097(a) are:

1. that a defendant be *aware* that a certain *use* of funds is unauthorized or wrongful; and,
2. that the defendant intentionally engaged in the wrongful conduct.

However, the Government then continues to argue that the use of the phrase "knowingly and willfully' . . . "does not connote an intent to injure or defraud." [Gov. Br. p. 18]. This asserts a position which is inconsistent with the essential elements of the offense set forth by the Government and is simply placing verbage over substantive analysis.

Mr. Bates has always maintained that misapplication of funds proscribed by § 1097(a) contains the essential elements of (1) conversion (i.e. unauthorized use of funds); and, (2) fraudulent intent. The essential elements of the offense as set forth by the Government in its brief are identical to those asserted by Mr. Bates, with the sole exception that a prime indicator of fraudulent motive (*awareness* of unauthorized or wrongful use) is coupled with unauthorized use as the first essential element of the offense. The analysis championed by Mr. Bates would simply require an initial determination that there was in fact an unauthorized use of funds which occurred; and, if the answer was yes, then require a determination that the unauthorized use was a result of fraudulent intent or wrongful purpose. Evidence that would lead a trier of fact to conclude that a defendant has consciously engaged in the conduct knowing that the *use* of funds was unauthorized would most certainly serve to aid in establishing fraudulent intent. Thus, the assertion by the Government that "knowingly and willfully" does not connote an intent to injure or defraud is rendered meaningless by the Government's own statement of the essential elements of misapplication of funds proscribed by § 1097(a).

B. The Government's position is inconsistent by acknowledging that misapplication is a species of conversion while admitting that the conduct with which Mr. Bates is charged is a failure to make refunds.

The Government acknowledges that misapplication under Section 1097(a) is a species of conversion and argues, correctly, that misapplication involves the unauthorized *use* of funds provided and insured by the United States. [Gov. Br. pp. 14-15].

Throughout the course of these proceedings, Mr. Bates has maintained that the Twelve (12) Counts of the indictment against him were not unambiguously stated inasmuch as these charges merely stated that Mr. Bates did knowingly and willfully misapply funds in a given amount on a given date. Since the term misapply is intrinsicly vague, (in that HEA funds could theoretically be used in numerous ways which may be unauthorized) and the indictment did not otherwise state the essential elements of the offense, Mr. Bates has argued that the indictment was deficient and subject to dismissal. In its brief before this Court, the Government *for the first time acknowledges*, in writing, that Mr. Bates is, in fact, being charged with a failure to make refunds. [Gov. Br. p. 21 n. 12].

What the Government ignores, by asserting both positions, is the fact that a "failure to make refunds" is *not an active use* of funds provided or insured by the United States *but an omission* alleged to have been committed by the petitioner. An allegation that the defendant made an error of omission regarding the funds says nothing about how the funds provided and insured by the United States were actually used by Mr. Bates during the period of time he was making decisions as to which debts of Acme were to be addressed first. It is Mr. Bates firm belief that every use he made of HEA funds during this period was an authorized use and that any failure of Acme to fully meet its refund liability was not the result of any unauthorized use of HEA funds during the period

when he exercised decision making authority over the use of said funds. Thus, the Government has brought charges against Mr. Bates which he cannot defend because the ultimate conduct of which the Government complains does not, of itself, constitute the statutory offense with which he is charged. As set forth in his opening brief, Mr. Bates contends that had the conduct of which the Government complains, (failure to make refunds) constituted, in and of itself, the offense of misapplication of funds in violation of § 1097(a), then the 1992 Amendment of the statute by Congress would have been unnecessary and entirely superfluous. This Court should not construe a statute in a manner as to render an act of Congress totally without meaning. See, *Ratzlaf v. United States*, 510 U.S. 135 (1994).

C. The Government is inconsistent and inaccurate in its description of the factual allegations of the indictment.

In an apparent effort to bolster its position by leading the Court to believe that conversion and fraudulent intent on the part of Mr. Bates could be inferred from the indictment, the Government has overstated the factual allegations of the indictment.

In its brief, the Government states that "[p]etitioner also determined that payments to the Jacksons and Education America would be given priority over making refund payments to lenders following student withdrawals." [Gov. Br. p. 5]. Further, the Government states, that "[s]pecifically, according to the indictment, petitioner intentionally directed Acme employees not to make refund payments and gave priority to payments for management fees and salary to the Jacksons and Education America over discharging Acme's refund obligations." [Gov. Br. p. 33]. As a basis for these statements, the Government has referred to pages 4 and 5 of the Joint Appendix.

Mr. Bates submits that nothing in the indictment (set forth in its entirety in the Joint Appendix, pages 2 through

12) alleges that Mr. Bates ever made payments to Education America or the Jacksons for management fees and salary while making day to day decisions as to which bills of Acme were to be first paid. The pertinent portion of the indictment merely states that Bates "had an understanding with the Jacksons that payments to the Jacksons and/or Education America and other bills took priority over payments of refunds." [J.A. p. 5]. Mr. Bates submits this sentence in the indictment does not allege that he, in fact, made any payments from Acme funds to Education America or the Jacksons. If any such payment had actually occurred, the Government easily could have plainly and unambiguously set forth such an allegation. Mr. Bates submits that the Government did not, and could not in good faith, make such an allegation.

Accordingly, this Court should not conclude, based on the statements in the Government's brief, that Mr. Bates was alleged to have made unauthorized use of funds provided and insured by the United States or that Mr. Bates harbored any fraudulent intent in so doing.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the opening brief of the Petitioner, the judgment of the United States Court of Appeals for the 7th Circuit should be vacated and the indictment of Mr. Bates dismissed.

Respectfully submitted,

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